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FROM Marc Tuckman DAG L.A.		ROOM/STA. NO.																		
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MESSAGE/REMARKS

Forwarded per request of
 DAG Marian M. Johnston

BY

Memorandum

To : Andrea Sheridan Ordin
Chief Assistant Attorney General
Public Rights Division

Date : May 16, 1983

File No.:

From : Marc E. Turchin
Deputy Attorney General
Office of the Attorney General
LOS ANGELES

Subject: Report of the Commission on Person^{al} Privacy

The majority of the recommendations propounded by the Commission involve the suggestion of new or amending legislation in the following areas: sexual orientation, information practices and records, criminal justice, employment, housing, consumer issues (e.g.: credit reports, bank records, insurance records), family matters and immigration. As Richard Jacobs' memo (attached) to the Attorney General indicates, only three of the Commission's recommendations directly involve DOJ. What follows is a summary of those recommended areas with which this office might wish to become directly involved or support.

A. Sexual Orientation

1. The Commission recommends that the Chair of the local Government Committee of the California State Senate request from the Attorney General's office a formal written opinion stating whether and on what constitutional and/or statutory bases sexual orientation discrimination by local government employers is presently illegal. While the Commission recognizes that California law clearly prohibits all government entities from sex orientation discrimination in employment (Gay Law Students Assn. v. Pacific Telephone & Telegraph Co. (1979) 24 Cal.3d 458, 467), it found that "[s]ome municipalities are either unaware of their obligations under present law or simply choose to ignore them." (Report, p. 412.) The Commission suggests that this opinion be distributed to all city attorneys, county counsels and local government personnel officers.

While an opinion in this area would do little more than restate what the California Supreme Court has clearly enunciated, since the Commission concluded that a formal opinion which has state-wide distribution would assist in achieving uniformity in this area, it seems like a recommendation which this office should follow once the opinion request is made. Alternatives to consider would be an Attorney General Press Release or Statement on this subject.

2. The Commission recommended that the DOJ Commission on Peace Officer Standards and Training (POST) (Pen. Code §§ 13500 et seq.) develop and certify programs and training materials on the handling of cases involving violence against lesbians and gay men for use at academies, basic training and advanced officer training, and that DOJ and local law enforcement incorporate into their sexual assault training materials and handbooks sections concerning sensitive approaches and procedures in cases involving violence directed against lesbians and gay men.

This is currently an important issue in San Francisco. To the extent that special expertise has been developed by law enforcement personnel in dealing with rape victims in terms of sensitivity of approach, the recommendation that POST develop programs and training materials for the sensitive handling of cases involving violence against lesbians and gay men might be one that this office would want to support.

3. The Commission recommends that the Legislature amend the Fair Employment and Housing Act (FEHA) to include "sexual orientation" among those categories of discrimination specifically prohibited by law. The Attorney General is presently supporting AB 1 (Agnos) which would make it unlawful under the FEHA to discriminate in employment on the basis of sexual orientation. While AB 1 does not cover sexual orientation discrimination in housing, the Unruh Act can be used for this purpose. In this regard, the Commission recommends that the Unruh Act be amended to expressly state that DFEH has jurisdiction to receive and investigate complaints alleging violations of the Unruh Act. (Gov. Code § 12930(f)(2).) This cross-referencing between the FEHA and the Unruh Act is a good idea and one we might want to support in terms of amending legislation.

B. Information Practices and Records

The Commission makes several recommendations with respect to the Information Practices Act (1977) which this office might wish to consider supporting:

1. Amending the Act to make it applicable to records maintained by local government agencies;

2. Legislative funding for a Privacy Advisory Council to advise the Office of Information Practices and to make

recommendations for legislative and administrative changes;

3. The establishment of a Section on Systems and Public Information which would assist each agency with its requirements for complying with the Act;

4. The establishment of an Informational Privacy Research Center to keep up to date on legislative and judicial developments affecting personal privacy rights; and

5. The repeal of existing sections of the California Public Records Act (1968) allowing public access to arrest records prior to the time an accusation is filed in court.

C. Employment

1. Labor Code section 432.2 prohibits an employer from requiring submission to a polygraph or lie detector test as a condition of employment and exempts federal, state and local public agencies from the prohibition. The Commission recommends that this section be amended to eliminate the blanket exemption for government employers and that the only exempt positions should be those requiring top security clearance. While DLE is opposing AB 487 (Chacon), a bill which would remove the blanket exemption but which does not speak to the issue of top security clearance, this office might consider supporting the bill with the recommendation that the exemption be retained for those employees requiring top security clearance.

2. The Commission recommends that the Legislature add a chapter to the Labor Code which would prohibit an employer from (a) soliciting or requiring the divulgence of any information about an employee's private life which information is not necessary to job performance; (2) using any such information to influence any decision regarding hiring or promotion; and (3) subjecting an employee to harassment on the basis of any such information.

D. Consumer Issues: Credit Records

1. The California Consumer Credit Reporting Agencies Act allows credit bureaus to disclose personal information on computers to anyone with "legitimate business need." The Commission found that this definition allows the large credit bureaus to sell their computer files to anyone who wants them

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even though there has been no consumer-initiated credit request. The Commission recommends that the definition of "legitimate business need" be narrowed to include only "consumer-initiated transactions," that consumer credit bureaus that maintain computerized consumer credit files be required to obtain a special permit to do business in California and that the Department of Consumer Affairs issue/renew such permits only to credit bureaus that conduct certified annual audits of data security systems showing the identity of everyone gaining access to their computerized credit files. These recommendations seem well taken and thought might be given to supporting them.

2. The Commission also recommends that legislation be enacted to subject renter reporting services to the protections contained in the California Consumer Credit Reporting Agencies Act and that the following areas be covered: accuracy of information, fair notice procedures, consumer access to records and the purging of adverse information after a reasonable period of time.

E. Consumer Issues: Insurance Records

1. The Insurance Information and Privacy Protection Act (Ins. Code §§ 791 et seq.) became law in October, 1981, and provides that if an insurance entity fails to comply with the provisions of the Act dealing with consumer access to records, correction of records or adverse underwriting decisions, the aggrieved consumer only has two non-monetary remedies: (1) complain to Insurance Commissioner; (2) seek a court order requiring the company to comply with the law. The Commission recommends that Insurance Code Section 791.20 be amended to provide for damages when insurance entities violate the rights of consumers to gain access to their records, to correct or amend inaccurate records, and to obtain an explanation for adverse underwriting decisions. The ability to obtain damages might put some "teeth" into the Act.

2. The Commission also recommends that Insurance Code section 770.1 be amended to prohibit lenders from sharing with third parties any personal information about borrowers that the lenders obtain from the borrowers' insurance policies, unless the lenders receive prior authorization permitting such disclosure. Present laws authorize such

Andrea Sheridan Ordin
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disclosure unless the borrower takes affirmative action to file a prohibitory statement.

F. Consumer Issues: Banking Records

The Commission found that Electronic Fund Transfer Systems (EFTS) pose serious threats to consumer privacy because they involve central computers with links to and between merchants and banks, with access to bank customers' financial and other personal information as well as information concerning what one is purchasing and from whom. The Commission suggests that the following protections be placed on these systems: (a) strict licensing of EFTS data banks requiring the tightest control possible on access; (b) eliminate the transaction details from the data base; and (c) require full disclosure to the customers of the privacy risks in using an EFTS.

While this list is not exhaustive, it provides areas in which this office might become active.


MARC E. TURCHIN
Deputy Attorney General

MET: ek
Attachment

cc: Marian M. Johnston
Deputy Attorney General

John K. Van de Kamp
Attorney General
Los Angeles

February 1, 1983

8 597-0285
415 557-0285

Report of the Commission on Personal Privacy

Nelson has asked that I review the Report of the Commission on Personal Privacy, and give you a general background report on it.

By Executive Order issued in 1980, former Governor Brown established the Commission on Personal Privacy; Burt Pines was later selected as Chairman. The Commission was charged with studying "the problems of discrimination based upon sexual orientation or invasions of the rights of personal privacy, in both the public and private sectors, documenting the extent of such problems, exploring in what forms the problems are manifested, noting existing remedies, and making recommendations for legislative, administrative, and other action where appropriate."

In December, 1982, the Commission filed its report and recommendations. The report contains an extensive discussion of the philosophical, statutory and constitutional bases for a right of privacy in numerous contexts; it focuses primarily on sexual orientation as a right of personal privacy, and also discusses the right of privacy in information practices and records, the criminal justice system, employment, housing, consumer issues, family matters, medical matters and immigration. The report makes various recommendations in each of these areas, many involving proposals for legislative changes. A copy of Appendix E to the Report is attached, and will give you a general overview of the types of recommendations made.

Only three of the recommendations explicitly involve the Department of Justice. One recommends that the Chair of the Senate Local Government Committee seek a formal opinion whether sexual orientation discrimination by local government employers is illegal; the purpose of the recommendation is to provide a formal Attorney General statement which can be transmitted to local governments "as a constructive and positive way to eliminate some of the discrimination which is a product of ignorance of the law."

John K. Van de Kamp

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The second recommendation is that the Department of Justice and local law enforcement agencies "incorporate into existing procedural handbooks or training materials used for sexual assault cases, sections suggesting sensitive interview approaches and procedures in cases of violence directed against lesbians and gay men." The purpose is to provide a "guide for all officers in the state when victims report such violent attacks." The final recommendation is that POST "develop and certify programs on the handling of cases involving violence against lesbians and gay men for use at academies, basic training, and advanced officer training" and that it "develop resource and training materials on this subject." (Although the report makes these recommendations, the data cited in their support is quite general and gives no quantitative indication of the extent of such violence.)

These issues, and many of the recommendations made by the report, are ones which may generate some public controversy. You may therefore want to set this for Executive Staff discussion (1) whether the Department should take steps to implement the specific recommendations of the report to the Attorney General; (2) whether the general subject of sexual orientation is one with which you wish to be publicly involved at this time; and (3) whether you should pursue legislatively some of the report's recommendations dealing with other areas of privacy. My personal view is that we should encourage the formal opinion recommendation and provide such an opinion; I am not convinced that the second and third recommendations warrant the time or controversy, or that you should actively pursue other areas of the report's recommendations.

RICHARD C. JACOBS
Special Counsel

RCJ:ccb

Attachment

cc: Nelson Kampsky

PART ONE: INTRODUCTION AND BACKGROUND

I. Approach of the Executive Summary

This Executive Summary is centered around the recommendations of the Commission on Personal Privacy. Additional material is presented in order to give those recommendations a meaningful perspective and to place them in a legal and historical context. All of the text contained herein is presented in a more elaborated form in the Report of the Commission on Personal Privacy.

For ease of reading and clarity of documentation, the right column of each page is reserved for citations of primary and secondary authorities--including cases, legislation, and constitutional provisions--as well as references to the Report and the Supplements published by the Commission.

The Report of the Commission--containing (1) an examination of real life problems that involve invasions of personal privacy and sexual orientation discrimination, (2) an evaluation of existing remedies, and (3) the recommendations--is based upon a study and analysis of many factors:

* the legal framework in which public policy decisions on personal privacy are made, including:

- the common law;
- United States Supreme Court and other federal court cases;
- all California Supreme Court and appellate court cases interpreting the right of personal privacy;
- United States, California, and other state constitutions;
- Congressional and California and other state legislative enactments;
- the myriad of California's administrative regulations which have an impact on the subject; and
- executive orders and other executive branch action;

The Report of the Commission on Personal Privacy is hereafter referred to as "REPORT".

See Appendix "B", page 114, below, for list of other documents produced by the Commission.

REPORT, page 16.

- * the reports of earlier study commissions, federal and state, from within and from outside this country;

- * books, reports, journals, periodicals, and over 300 articles on various aspects of personal privacy; and

- * the testimony and reports of experts, consultants, and witnesses who have shared information with the Commission.

II. Creation and Mandate of the California Commission

On October 9, 1980, Governor Brown signed an executive order which established the Commission on Personal Privacy. His mandate to the Commission was:

REPORT, page 12.

To study the problems of discrimination based upon sexual orientation or invasions of the right of personal privacy, in both the public and private sectors, documenting the extent of such problems, exploring in what forms the problems are manifested, noting existing remedies, and making recommendations for legislative, administrative, and other action where appropriate.

Executive Order
Appendix "A", page

The Governor acknowledged in the order that "a study of the problems of sexual minorities and of the adequacy of existing law to protect the personal privacy of all individuals is necessary. . . ."

The Commission is composed of twenty-five members with varied professional backgrounds, including business, education, journalism, labor, law, law enforcement, and psychiatry. The Governor appointed former Los Angeles City Attorney Burt Pines as Chairperson and 14 other commissioners. The Speaker of the Assembly appointed five commissioners. The remaining five appointments were made by the Senate Rules Committee. Commissioners reside in various parts of the state: San Diego, Los Angeles, Ventura, Fresno, Sacramento, and San Francisco.

The Commission chose an Executive Director who has an extensive background in law and a special expertise in personal privacy, research and writing, and public education.

The State Personnel Board was selected as the department to provide administrative support to the Commission.

EXECUTIVE SUMMARY

CALIFORNIA COMMISSION ON PERSONAL PRIVACY

Commission staffing was supplied by the Policy and Standards Division within the Board. The Commission's funding came from several state departments which requested that the Commission study various personal privacy and sexual orientation problems which the departments often encountered while carrying out their constitutionally and legislatively mandated duties. The Commission's total budget for an eighteen-month period was \$244,699.00. Of that amount, nearly \$60,000.00 was obtained through federal funding.

At its first meeting, on June 19, 1981, in Los Angeles, the Commission unanimously adopted the following statement of purpose:

REPORT, page 13.

TO EXPLORE problems of discrimination based upon sexual orientation and invasions of the right of personal privacy, particularly among such groups as the elderly, the disabled, ethnic minorities, adolescents, gays and lesbians, unmarried persons, and institutionalized persons;

TO DOCUMENT the extent of these problems;

TO NOTE the adequacy of existing law to protect the personal privacy of all individuals in this state;

TO REPORT our findings and to make any appropriate recommendations;

SO THAT legislative and administrative action and public attitudes may be based upon accurate information in order that the public policies of this state to safeguard human potential as our most valuable resource, to judge individuals on their own qualities and merits, to protect against sexual orientation discrimination, and to protect the right of personal privacy against the threat of invasion, may be effectively implemented in both the public and private sectors.

III. Operations of the California Commission

At the first meeting, the following Committees were established:

REPORT, page 14.

Aging and Disability

Family Relationships

Youth and Adult Corrections

Criminal Justice

Data Collection and Dissemination

Education and Counseling

Employment Discrimination

Medical and Mental Health Services

During the summer months of 1981, the Commission secured its staffing, the Committees met, and the Commissioners read articles and reports on the topics under study. The second meeting of the Commission was held on August 15, 1981, in Sacramento.

Two public hearings were held in November, 1981. The first hearing was held in Los Angeles on November 13. The second was held in San Francisco one week later. Approximately 30 witnesses appeared at each hearing, presenting the Commission with an extremely wide variety of issues. The full text of both hearings is available to the public through the State Personnel Board.

The third meeting of the Commission was held in Sacramento on January 30, 1982. During the fourth meeting, held September 11 and 12, 1982, the Commission considered and deliberated over its main Report, many topical reports, and substantive recommendations. The recommendations adopted by the Commission are set forth herein.

Nearly two hundred people worked on this project in various capacities: commissioners, paid staff supplied through the State Personnel Board, staff loaned from the Department of Social Services and the Department of Fair Employment and Housing, task force members, special consultants, students on work-study programs, student volunteers, and witnesses. The Commission on Personal Privacy was truly a cooperative effort of concerned citizens and community leaders.

IV. Other Study Commissions on Privacy

Prior to the creation of the California Commission, Massachusetts Governor Francis Sargent and Indiana Governor Otis R. Bowen had each created a state study commission on privacy. The Massachusetts Commission on Privacy and Personal Data was established in August, 1973, and issued a report on "Informational" privacy problems some fifteen months later. The Indiana Commission on Individual Privacy was formed in April, 1975, and published its report, also on "Informational" privacy, on December 1, 1976.

REPORT, page 6.

Four legislatively created commissions have been involved in the study of "informational" privacy:

<u>State</u>	<u>Commission</u>	<u>Date</u>
Illinois	Information Systems Commission	1975-present
Minnesota	Joint House-Senate Privacy Study Commission	1975 (18 mo)
Iowa	Citizens Privacy Task Force	1978 (16 mo)
New Jersey	Committee on Individual Liberty and Personal Privacy	1979 (became inactive af- ter interim report)

The most comprehensive study of informational privacy was conducted by a temporary study commission created by Congress pursuant to the Privacy Act of 1974. The Privacy Protection Study Commission's main report, entitled Personal Privacy in an Information Society, documented that:

REPORT, page 7.

* Public opinion data suggest that most Americans treasure their personal privacy, both in the abstract and in their daily lives.

* Privacy encroachments are increasing. It is now commonplace for one to be asked to divulge information about oneself for use by unseen strangers who make decisions about one that directly affect one's everyday life, e.g., transactions involving credit, insurance, medical care, employment, education, and social services.

* There is a real need for ongoing monitoring and coordination of personal privacy

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